

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

TAMARA MASSEY)	
Claimant)	
)	
VS.)	
)	
NORSEMAN PLASTICS, INC.)	
Respondent)	Docket No. 1,038,787
)	
AND)	
)	
ACCIDENT FUND INSURANCE CO.;)	
CONTINENTAL WESTERN INS. CO.; and)	
UNITED WISCONSIN INS. CO.)	
Insurance Carriers)	

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier, Accident Fund Insurance Co. (Accident Fund) requested review of the May 14, 2008, preliminary hearing Order entered by Administrative Law Judge Brad E. Avery. George H. Pearson, of Topeka, Kansas, appeared for claimant. Christopher J. McCurdy, of Overland Park, Kansas, appeared for respondent and its insurance carrier, Accident Fund. Ronald J. Laskowski, of Topeka, Kansas, appeared for respondent and its insurance carrier, Continental Western Insurance Co. (Continental Western). Michelle Daum Haskins, of Kansas City, Missouri, appeared for respondent and its insurance carrier, United Wisconsin Insurance Co. (United Wisconsin).

The Administrative Law Judge (ALJ) found that claimant suffered an accidental injury that arose out of and in the course of her employment with respondent. The ALJ found that claimant's date of accident was June 21, 2006, and that notice was timely. Accordingly, the ALJ ordered respondent and its insurance carrier, Accident Fund, to pay for claimant's medical treatment with Dr. John B. Moore, IV.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the May 13, 2008, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Respondent and its insurance carrier, Accident Fund, assert that claimant did not sustain an injury by personal accident arising out of and in the course of her employment during the period Accident Fund was on the risk.

Respondent and its insurance carrier, United Wisconsin, contend that the date of accident for claimant's repetitive injuries was June 21, 2006, when she was placed on light duty restrictions because of her work-related repetitive injuries. Respondent and United Wisconsin also note that Accident Fund was respondent's workers compensation carrier for the period of time encompassing June 21, 2006.

Claimant adopted the arguments and authorities set forth in the brief of respondent and United Wisconsin.

Respondent and its insurance carrier, Continental Western, did not file a brief in this appeal.

The issue for the Board's review is "whether claimant sustained a personal injury by accident arising out of and in the course of her employment on June 21, 2006."¹

FINDINGS OF FACT

Claimant began working for respondent in October 2005. In mid-2006, she began experiencing pain in her wrists and numbness in her hands. On June 21, 2006, she saw a nurse practitioner, Melissa Herdman, complaining of swollen and painful hands and numbness up to her elbows. Ms. Herdman placed claimant on light duty. Ms. Herdman referred claimant to Dr. Johnson Huang, who performed an EMG. The EMG did not show any evidence of carpal tunnel syndrome, and claimant was released to full duty in July 2006.

Even though claimant was released from treatment, she continued to have pain in her wrists. Claimant said that while she was coming down a ladder on August 24, 2006, her "left wrist collapsed."² She was seen by Dr. James Seeman, who diagnosed her with a wrist injury and referred her to Dr. John Gilbert. Dr. Gilbert treated claimant's left wrist injury and placed her on light duty work. He released her to full-duty work in January 2007. Again, claimant was having symptoms in her bilateral wrists when she was released to work in January 2007.

¹ Respondent and insurance carrier Accident Fund's Application for Review, filed May 19, 2008, at 1.

² P.H. Trans. at 12.

Claimant returned to her regular work duties in January or February 2007. She states her wrist conditions and symptoms worsened, and on August 31, 2007, respondent sent her to Dr. Dale Garrett. Dr. Garrett referred her to Dr. John Moore, who ordered nerve conduction studies. After seeing the results of the studies, Dr. Moore diagnosed claimant with bilateral carpal tunnel syndrome and recommended surgery on both hands.

Respondent has had three different workers compensation insurance carriers during the period of time from June 2006 to present. Accident Fund had coverage for respondent from December 3, 2005 to December 3, 2006, after which respondent had coverage with Continental Western. United Wisconsin took over coverage for respondent on August 3, 2007, and still has coverage.

PRINCIPLES OF LAW

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.³ Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.⁴

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.⁵

The Board's jurisdiction to review a preliminary hearing order is limited. K.S.A. 2007 Supp. 44-551(i)(2)(A) states in part:

If an administrative law judge has entered a preliminary award under K.S.A. 44-534a and amendments thereto, a review by the board shall not be conducted

³ K.S.A. 2007 Supp. 44-501(a).

⁴ *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 899 P.2d 1058 (1995).

⁵ *Id.* at 278.

under this section unless it is alleged that the administrative law judge exceeded the administrative law judge's jurisdiction in granting or denying the relief requested at the preliminary hearing.

K.S.A. 44-534a restricts the jurisdiction of the Board to consider appeals from preliminary hearing orders to the following issues: (1) whether the employee suffered an accidental injury; (2) whether the injury arose out of and in the course of the employee's employment; (3) whether notice is given or claim timely made; or (4) whether certain defenses apply.

These issues are considered jurisdictional and subject to review by the Board upon appeals from preliminary hearing orders. The Board can also review a preliminary hearing order entered by an administrative law judge if it is alleged the administrative law judge exceeded his or her jurisdiction in granting or denying the relief requested.⁶

Although respondent and Accident Fund set out the issue on appeal as whether claimant sustained injuries as a result of an accident or accidents that arose out of and in the course of her employment on June 21, 2006, the true issue is which insurance carrier is responsible for the cost of providing medical treatment for claimant's bilateral carpal tunnel syndrome. This dispute would be resolved by determining the appropriate date of accident. But that is not an issue listed in K.S.A. 44-534a as jurisdictional and does not otherwise raise an issue that the Judge exceeded his jurisdiction.⁷ Clearly, the Judge did not exceed his jurisdiction.

Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly.⁸

The Board is unaware of any provision in the Workers Compensation Act that purports to give the Board jurisdiction to review a preliminary hearing order for redetermining the liability among multiple insurance carriers. The Board was presented with a similar issue in *Ireland*,⁹ where, in holding that the Board was without jurisdiction to consider the issue of which insurance carrier should pay for preliminary hearing benefits, the Board said:

⁶ See K.S.A. 2007 Supp. 44-551.

⁷ K.S.A. 44-551(b)(2)(A); See *Carpenter v. National Filter Service*, 26 Kan. App. 2d 672, 994 P.2d 641 (1999).

⁸ *Allen v. Craig*, 1 Kan. App. 2d 301, 303-304, 564 P.2d 552, rev. denied 221 Kan. 757 (1977).

⁹ *Ireland v. Ireland Court Reporting*, Nos. 176,441 & 234,974 (Kan. WCAB. Feb. 1999); see *Carlson v. Metro Express*, Nos. 248,200 & 268,381, 2002 WL 985408 (Kan. WCAB Apr. 26, 2002).

Furthermore, it is inconsistent with the intent of the Workers Compensation Act for a respondent to delay preliminary hearing benefits to an injured employee while its insurance carriers litigate their respective liability. The employee is not concerned with questions concerning this responsibility for payment once the respondent's general liability under the Act has been acknowledged or established.¹⁰

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.¹¹ Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2007 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.¹²

ANALYSIS AND CONCLUSION

The arguments presented by respondent and its insurance carriers in the briefs to the Board are not about if claimant suffered personal injury by accident arising out of and in the course of her employment with respondent, but rather when her accident and injuries occurred. Accordingly, the issue presented for the Board's review does not concern the compensability of claimant's injury but concerns the date of accident for the purpose of determining which of respondent's insurance carriers should be liable for claimant's preliminary benefits. Date of accident is not an issue the Board has jurisdiction to decide on an appeal from a preliminary hearing order unless that determination is necessary in order to determine a jurisdictional issue, such as whether notice was timely. As the Board is without jurisdiction to decide the issue appealed at this stage of the proceedings, this appeal must be dismissed.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that this appeal from the Order of Administrative Law Judge Brad E. Avery dated May 14, 2008, is dismissed.

IT IS SO ORDERED.

¹⁰ *Id.* See also *Kuhn v. Grant County*, 201 Kan. 163, 439 P.2d 155 (1968); *Hobelman v. Krebs Construction Co.*, 188 Kan. 825, 366 P.2d 270 (1961).

¹¹ K.S.A. 44-534a; see *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

¹² K.S.A. 2007 Supp. 44-555c(k).

Dated this _____ day of July, 2008.

HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

c: George H. Pearson, Attorney for Claimant
Christopher J. McCurdy, Attorney for Respondent and its Insurance Carrier Accident
Fund Ins. Co.
Ronald J. Laskowski, Attorney for Respondent and its Insurance Carrier Continental
Western Ins. Co.
Michelle Daum Haskins, Attorney for Respondent and its Insurance Carrier United
Wisconsin Insurance Co.
Brad E. Avery, Administrative Law Judge